ROBIN

v.

SUNRISE INVESTMENTS PTE. LTD. & ANOR.

HIGH COURT, SINGAPORE
CHAO HICK TIN J
[SUIT NO. 6585 OF 1983]
24 JANUARY 1991

TORT: *Defamation - Qualified privilege - Proof of malice. Malicious prosecution - Elements of action - Proof of malice - Effect of acquittal - Meaning of reasonable and probable cause - Effect of reasonable and probable cause - Sufficiency of evidence.*

The second defendant (D2) was the plaintiff's accountant. He was also a shareholder and agent for the first defendant (D1). The plaintiff (R) was a permanent resident in Australia but still had business interests in Singapore. In the course of visiting D2 to sort out his tax matters, R indicated that he was looking for business opportunities in Australia, especially in jewellery and stones. D2 then showed R some emeralds belonging to D1. On R's departure D2 could not find the emeralds and believed that R had taken the emeralds. D2 tried calling R on the telephone to demand their return. R denied taking the emeralds.

D2 then lodged a police report to the effect that R had received the emeralds so that he could decide whether to purchase them or not, and alleged that R had absconded with them. It was also alleged that R was expected to leave for Australia soon. R was accused of committing breach of trust or cheating. D2 also wrote to Changi Airport Police, immigration officer at Changi Airport, public prosecutor's office and the commercial attache to the Australian High Commission. However, these letters were not sent but were instead given to the investigating officer.

R was arrested and released on bail. He was charged in Court. The parties tried to reach a settlement through their respective solicitors without success. As a result of R's petition for withdrawal of the charge the public prosecutor decided to withdraw the charges against R and he was given a discharge amounting to an acquittal.

R now sues the defendants for malicious prosecution and defamation. The defendants counterclaim for the return of the emeralds.

Held:

[1] To succeed in an action for malicious prosecution, a plaintiff must prove:

(i) the prosecution by the defendant of a criminal charge against the plaintiff before a tribunal into whose proceedings the criminal Courts are competent to inquire;

(ii) that the proceedings terminated in the plaintiff's favour;

(iii) that the defendant instituted or carried on the proceedings maliciously;

(iv) that there was an absence of reasonable and probable cause for the proceedings; and

(v) that the plaintiff has suffered damage. In the present case only (iii) and (iv) were in dispute.

[2] Mere acquittal does not mean that the criminal proceedings were without reasonable and probable cause. It is a question of fact dependant on all circumstances.

[3] Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a certain set of circumstances, which, if true, would reasonably lead any ordinarily prudent and cautious man in the position of the defendant to the conclusion that the accused was probably guilty of the crime imputed. If reasonable cause is established, it does not matter whether there was malice or not. Therefore, looking at the police report as a whole and bearing in mind that D2 was aware that he himself would be questioned on the report and that R would also be given a chance to explain, the wording of the report or any omission therein could not reasonably be construed to suggest any improper intention or motive.

[4] The letter written by D2's solicitors to the airport authorities shows an aggrieved complainant who wanted the police to act with due haste. It does not show bad motive and the fact that it was copied to four other parties also does not indicate malice. A party who is convinced that someone else has taken his things is entitled to pursue his case vigorously.

[5] With respect to the claim for defamation, the letter and reports were written on an occasion of qualified privilege. To succeed, R had to show that there was express malice. No malice has been shown by R.

[6] With respect to the counterclaim, the defendants had not discharged the burden of proving that R had taken the emeralds.

[Both claim and counterclaim dismissed.]

Cases referred to:
Abrath v. North Eastern Railway Co. [1883] 11 QBD 440 ***(foll)***
Willans v. Taylor [1829] 6 Bing 182; 130 ER 1250 ***(foll)***
Tempest v. Snowden [1952] 1 KB 130 ***(foll)***
Hicks v. Faulkner [1878] 8 QBD 167 ***(foll)***
Herniman v. Smith [1938] AC 305 ***(foll)***
Collins v. Cooper [1902] 19 TLR 118 ***(foll)***
Bowles v Amstrong [1913] 32 NZLR 409 ***(foll)***

Other source referred to:
Halsbury's Laws of England, 4th Edn., para. 1348

For the plaintiff - Harry Elias; Francis Joan Madelene
For the defendants - Cheng Tim Pin; Lo Wai Ping

JUDGMENT

Chao Hick Tin J:

This is an action instituted by the plaintiff against the defendants for malicious prosecution and libel on account of a police report made on 15 March 1983 by the second defendant, on behalf of the first defendant, against the plaintiff. The second defendant was and is a shareholder and director of the first defendant. The second defendant was also at the material time the sole proprietor of Jee Ah Chian & Co., a firm of public accountants.

Plaintiff's Evidence

The plaintiff first came to know the second defendant in 1952 when the latter was the book-keeping teacher of the former at the YMCA. They met again in 1967 and from then the plaintiff appointed the second defendant as his consultant to deal with his tax matters. Their relationship from then until the date of police report was purely professional. They did not have any other social or business dealings.

In 1982, through financial investments, the plaintiff obtained immigrant status in Australia and left for Australia in August that year. A condition of the scheme governing the plaintiff's immigrant status was that he had to stay for a year in Australia. In order not to affect that status he could only leave Australia during that one year period for good reasons, e.g. business.

On 9 March 1983, the plaintiff returned to Singapore to consult the second defendant on his tax matters. Before departing from Australia the plaintiff wrote to the second defendant on 23 February 1983 informing the latter that he would be arriving in Singapore on the evening of 9 March 1983 and that he would be staying there for a week. The plaintiff also requested for an appointment to see the second defendant at 10.15 am on 10 March 1983. At the time the plaintiff was still a citizen of Singapore and was (and still is) a shareholder and director of Standard Photo Pte. Ltd.

According to the plaintiff, he came to see the second defendant at his office at the appointed time and handed over to the second defendant the books and documents to enable the second defendant to prepare the accounts and the tax returns. The plaintiff was asked to come back on 14 March 1983 to sign the accounts and the tax returns. He left two contact telephone numbers with the second defendant - the office number (2356264) of one Mr. Khafi and the office number (2829122) of Standard Photo at MacPherson Road. Mr. Khafi was the personal friend of the plaintiff with whom the plaintiff was then staying. The plaintiff could not be sure whether he identified the two places to which the two telephone numbers related.

The plaintiff returned to see the second defendant on 14 March 1983. He said that the second defendant's table was cluttered with files and papers. He went through the accounts and tax returns with the second defendant and signed them and paid for the services by way of cheque. A receipt was issued for the payment. When he was about to leave the second defendant's office, he asked the latter where the toilet was. He left his briefcase in the second defendant's room. On his return from the toilet, he saw the second defendant opening his drawer and taking out a packet. From the packet the second defendant showed the plaintiff some green stones and said that those were emeralds. The stones were wrapped with a silk type of paper or oily paper. The plaintiff picked up a few of the stones to have a feel. He put the stones back into the paper wrap and the phone rang. The second defendant picked up the phone and the plaintiff left the second defendant's office. (I may add that in cross-examination the plaintiff gave a slightly different sequence of events: 'Phone rang. I put the stones back. Bid him farewell and left.') He did not take any of the stones. The plaintiff said that he saw one of the second defendant's hands was placed on the paper wrap. On this visit on 14 March 1983, the plaintiff did not inform the second defendant the date when he would be returning to Australia.

After leaving the second defendant's office, the plaintiff went to a couple of other places before returning to the Khafi's residence at 6.15 p.m. Mrs. Khafi told the plaintiff that there was an urgent call from the second defendant at Mr. Khafi's office. He thought it related to his tax matters. As it was past the normal office hours, he decided that he would return the call the next day. The next morning (15 March 1983) a co-director of Standard Photo came to fetch the plaintiff to the Standard Photo main office at MacPherson Road. On arrival he was told that the second defendant was trying to contact him. He called up the second defendant (at about 9.15 a.m.) who said this to him,

> Hi Robin, you did not return the stones. Unless you return it right away, I am going to report you to the police.

On hearing that, the plaintiff said he was astounded and told the second defendant that he must be mad. The plaintiff threatened the second defendant that if he persisted in that accusation, he would take legal action against him. The plaintiff said that he asked the second defendant to wait for him as he was coming right away to confront him with regard to the accusation. The second defendant agreed to wait for him to come over. The plaintiff arrived at the second defendant's office just before 10 a.m. in the company of two co-directors. But the second defendant was not there. They waited for 45 minutes and then the plaintiff received a telephone call from Standard Photo informing him that an Insp. Loo from the Central Police Station was looking for him. After speaking to his legal adviser (Mr. Elias) on the phone the plaintiff called Insp. Loo and made an appointment to see Insp. Loo at 4.30 p.m. that afternoon.

In the company of his legal adviser and a co-director, the plaintiff kept his appointment with Insp. Loo. When he was interviewed in private by Insp. Loo, the plaintiff denied that he had taken the emeralds or that he was running away. The plaintiff also told Insp. Loo that he was not leaving on 17 March 1983 but on 20 March 1983. At about 5 p.m. the second defendant came into Insp. Loo's office and accused him of taking the stones. The plaintiff called the second defendant a liar. After the second defendant left, a statement was taken by Insp. Loo from the plaintiff. Insp. Loo also prepared a charge of criminal breach of trust against the plaintiff. The plaintiff was arrested and released on bail. He was charged in Court on 16 March 1983. On 18 March 1983 the case was fixed for hearing on 29 December 1983; but the Court allowed the plaintiff to leave Singapore. In the meantime between 16 and 18 March 1983, there were some discussions between the solicitors of the two parties, initiated by the plaintiff's solicitor, with the aim of terminating the criminal proceedings and having the dispute be determined in a civil action. And as part of the understanding, the plaintiff would not sue the second defendant on account of the police report. The proposal was that they should make a joint petition to the public prosecutor. However, no agreement could be reached. The plaintiff explained that he was anxious to have the matter sorted out because if he did not return to Australia by a certain date his immigrant status would be adversely affected.

On 4 June 1983, the plaintiff's solicitor wrote a petition to the Attorney General's Chambers asking that the charge against the plaintiff to be withdrawn. On 15 July 1983, the plaintiff's solicitor was informed that the charge would be withdrawn. On 7 September 1983 a District Court discharged the plaintiff amounting to an acquittal.

The plaintiff said that he first came to know of Sunrise Investments (Pte.) Ltd., the first defendant, on seeing the police report made by the second defendant. His dealings were entirely with the second defendant. The plaintiff said that in 1983 he was not dealing in real jewellery. Then his business was in 8mm home movie films, pre-recorded video tapes, imitation jewellery, watches, spare parts and tools. Prior to 1983 he had been dealing in imitation jewellery for 10 to 12 years. Even at the time of his evidence in Court, the plaintiff was not dealing with precious stones but in gold and silver jewellery. He had no experience or knowledge of precious stones.

The plaintiff admitted that from 1952 until 1983 their relationship was cordial. There had never been any misunderstanding or ill-will between them though they had no social interaction. From 1967 until 1983, he was satisfied with the second defendant's work. He had no complaints. The second defendant had never asked him to do anything improper. The plaintiff did not know of any reason why the second defendant would want to harm him. At the time (that is, March 1983), the plaintiff was not doing anything in Australia. He told the Court that for 15 months from August 1982 (the time he first immigrated there) he was not working and was looking for something to do.

The plaintiff denied the defendant's Counsel's suggestion that the emeralds were packed in a small plastic packet with a small piece of paper in it on which was written the weight, the price and the number of stones therein. He denied that such a packet was handed to him for his visual inspection. He denied that the second defendant had handed to him any emeralds for his decision whether to buy or to return on the same day.

Defendant's Evidence

In his evidence the second defendant confirmed what the plaintiff said as to how they came to know each other and their subsequent relationship. There had never been any dispute between them. On 10 March 1983, the plaintiff came to see the second defendant with his books and documents to enable the accounts to be prepared and the tax returns completed. The plaintiff left two contact telephone numbers here and also gave his Australian address.

On 14 March 1983 when the plaintiff came to see him; the second defendant said there were five files on his table, two on one side and three on the other. The files/papers on his table were not in a disorderly state. The second defendant explained the accounts and the returns to the plaintiff and the latter appeared happy. The plaintiff asked questions on the accounts. After he signed the accounts and the returns, the second defendant gave him the bill for the service rendered. The plaintiff paid the sum stated in the bill. While they were waiting for the receipt to be issued by the second defendant's staff, they had a conversation where the plaintiff said that he was looking for business opportunities in Australia especially in jewellery and stones. The second defendant said that he had some emeralds and at the request of the plaintiff, the second defendant took out a small plastic packet containing emeralds and handed it to the plaintiff for his visual inspection. The plaintiff told the second defendant that he would either buy it straight away or decide before the end of the day. Then the phone rang and the second defendant picked it up. While the second defendant was so talking on the phone the plaintiff left the second defendant's office. The plaintiff did not hand anything back to the second defendant. The second defendant did not notice when the plaintiff left his office. The time then was about 11.30 a.m.

At 12.30 p.m. that afternoon, the second defendant called the plaintiff at the two contact telephone numbers to get his confirmation as to his decision on the emeralds as the plaintiff had left his office without saying anything. At both places the plaintiff was not there and the second defendant left a message for the plaintiff to return the call urgently. The second defendant recognized one of the two telephone numbers as that of Standard Photo. At 2.30 p.m. that same day the second defendant called both telephone numbers again and still he could not reach the plaintiff. The second defendant again left the same message for the plaintiff to return the call. At about 5 p.m. that same afternoon the second defendant called a third time on the two telephone numbers and the plaintiff was still not there. Again the second defendant left the same message for the plaintiff.

The next morning, 15 March 1983, the second defendant arrived at his office at 8.30 a.m. He said he called the two numbers nine to ten times but the reply was still that the plaintiff was not in. Shortly after that the plaintiff called the second defendant who asked the plaintiff what his decision was on the stones. The plaintiff called the second defendant a mad man and denied receiving the stones; he shouted at the second defendant. There was no appointment for the plaintiff to come to see the second defendant at the latter's office. Immediately after that telephone conversation the second defendant went to see his solicitor whose office was located on the same floor of the same building. He did so specifically to obtain guidance from his solicitor. He wanted to be careful. His solicitor warned him about the consequences of lodging a police report. With the help of his solicitor, a report, in these terms was lodged by the second defendant:

On 14 March 1983 about 11.30 a.m. at the request of Mr. Silas Saul Robin (SS Robin) of temporary resident of Australia (NRIC No. 1041522/E) I, Lee Boon Chye, on behalf and for Sunrise Investments (Pte) Ltd. handed to him a plastic pack of (small) containing 45 pieces cut/polished round emeralds (8.98 carat at $650 = $5,837) for his viewing and return on the same day or immediately for his decision. Mr. SS Robin cannot be contacted at the telephones 2829122 and 2356264 given nor return the said emeralds.

Mr. SS Robin is expected to fly to Australia on Thursday, 17 March 1983, as our company believes that he is now a temporary resident of Australia.

I lodge this report against Mr. SS Robin as I, Lee Boon Chye, acting on behalf of Sunrise Investments (Pte) Ltd. believe he may be committing an offence of cheating or criminal breach of trust.

In the afternoon of the same day the police report was made, that is, 15 March 1983, the second defendant's solicitor also wrote a letter to the officer-in-charge of the Central Police Station which was copied to the Changi Airport Police, the immigration officer at Changi Airport, the public prosecutor's office and the Commercial Attache to the Australian High Commission, as follows (2DB13):

We act for Mr. Lee Boon Chye of 36 Philip Street, #02-00 Leong Chuan Building, Singapore 0104.

We repeat that the abovenamed is intending or planning to fly to Australia.

We repeat that the abovenamed is a non-resident in Singapore and is planning to leave Singapore for Australia on Thursday, 17 March 1983.

As stated in the police report, the abovenamed has committed an offence of cheating or criminal breach of trust.

The abovenamed is contactable at telephone No. 2829122 or No. 2356264 as given by him, or at 565-B, 2nd Floor, MacPherson Road, Singapore 1336, as given by him.

Our client requests that you take steps to arrest the abovenamed before his flight to Australia.

A note was also appended at the bottom of the letter marked for the attention of the two authorities at Changi Airport as follows:

At the airport, please search the above named for a bag of 45 pieces of 8.98 carats of green emeralds. Please check the manifest of passengers from Singapore to Australia today, tomorrow and the day after (Thursday, 17 March 1983).

The second defendant explained that by the last para in the letter, he wanted the police to stop the plaintiff from leaving Singapore. On the advice of his solicitor, the plaintiff had to be arrested. The original of the letter, plus the four copies, were handed by the solicitor to the second defendant who despatched all five copies by hand to Insp. Loo at Central Police Station, marked 'Private and Confidential'. The carbon copies were not sent out to the carbon copy addresses. They were received by Insp. Loo at about 4.30 p.m. The second defendant explained that he had in that letter asked the airport authorities to search the plaintiff because he was sure that the plaintiff took the emeralds and that they would be on the plaintiff's body.

The second defendant also told the Court that earlier, on 6 March 1983, he made a bulk purchase of a quantity of emeralds totalling approximately 41.86 carats. On 8 March 1983, he repacked them into ten small plastic packets to facilitate handling and sale. His business was mainly on consignment basis. A record was made of the contents of the ten plastic packets: see DB3. He marked each plastic packet personally. The third packet was sold and

the fourth was given to the plaintiff. The strepsils box, which contains the remaining eight packets, was produced to Court (marked as Exhibit 'D2'). He said that the emeralds were not wrapped with the silk or oily paper though there were two such wrappers in the box 'D2'. He explained that he did not pack the emeralds in that way because the emeralds, being so small, could easily drop. The empty wrappers were placed in the box just in case a purchaser would want to have them. However, he agreed that precious stones are normally wrapped with such papers.

The second defendants recalled the sale of bracelet he made to the plaintiff on 11 March 1975. Exhibit 'D1' was tendered in support. That sale was made by the second defendant on behalf of the first defendant. The business of the first defendant, which first started in 1966, was carried out by the second defendant and his son (DW2).

In cross-examination the second defendant said that he had other emeralds, apart from those he bought on 6 March 1983, in the safe in his office. He denied there was any mix-up between those he bought on 6 March 1983 and his other emeralds.

On 16 March 1983, pursuant to a request made by the plaintiff's solicitors, a search of his desk was made by the second defendant. But nothing was found. The second defendant said the search was carried out just to comply with the request of the plaintiff because the second defendant was certain that he did hand the emeralds to the plaintiff who never returned them to him.

Malicious Prosecution: The Law

I will first deal with the claim under malicious prosecution. The essentials that need to be proved by a plaintiff in an action for malicious prosecution are succinctly set out in *45 Halsbury's Laws of England* (4th Edn.) para. 1348 as follows:

> ...to succeed in an action for damages for malicious prosecution a plaintiff must prove (1) the prosecution by the defendant of a criminal charge against the plaintiff before a tribunal into whose proceedings the criminal Courts are competent to inquire; (2) that the proceedings complained of terminated in the plaintiff's favour; (3) that the defendant instituted or carried on the proceedings maliciously; (4) that there was an absence of reasonable and probable cause for the proceedings; and (5) that the plaintiff has suffered damage.

In relation to our present action it has not been argued that essentials (1), (2) and (5) have not been proven. The contentions centred on essentials (3) and (4) which are invariably the two most difficult questions in an action for malicious prosecution. Acquittal on a charge does not mean that the institution of the criminal proceedings was necessarily without reasonable and probable cause. This comes out loud and clear from the decision of Brett MR. in *Abrath v. North Eastern Railway Co.* [1883] 11 QBD 440 where he said at p. 448 as follows:

> It is not enough for the plaintiff to show, in order to support the claim which he has made, that he was innocent of the charge upon which he was tried; he has to show that the prosecution was instituted against him by the defendants without any reasonable or probable cause and with a malicious intention in the mind of the defendants, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact. It has been decided over and over again that all these points must be established by the plaintiff, and that the burden of each of them lies upon the plaintiff.

What will constitute want of reasonable and probable cause and malice will have to depend on the circumstances of the case. As was so aptly observed by Tindal CJ in *Willans v. Taylor* [1829] 6 Bing 182; 130 ER 1250 at p. 186:

> What shall amount to such a combination of malice and want of probable cause is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused.

However, if reasonable and probable cause is established, it does not matter whether there is or is no malice. As Denning LJ stated in *Tempest v. Snowden* [1952] 1 KB 130 at p. 140:

> Even though a prosecutor is actuated by the most express malice, nevertheless he is not liable so long as there was reasonable and probable cause for the prosecution.

Therefore, a plaintiff who proves malice but not want of reasonable and probable cause still fails. 'There must be a concurrence of malice in the defendant and want of probable cause' - Tindal CJ in *Willans*. Want of reasonable and probable cause does not *per se* amount to malice; but malice may be inferred therefrom.

Assessment of the evidence

Let me first set out briefly the obviously undisputed facts that emerged from the evidence of both the plaintiff and the second defendant. They first came to know each other in 1952. In 1967 the plaintiff appointed the second defendant as his tax consultant and this relationship, which was cordial and which continued until the occurrence of the incident in March 1983 which formed the subject of this action. Until then, both parties had no complaint against each other. There was nothing unharmonious in their relationship. But it was a purely professional relationship as they did not socialize on a personal level. The event on 15 March 1983 was the first time that the second defendant had made any criminal or unfriendly allegation against the plaintiff.

In the letter of 23 February 1983, the plaintiff sought an appointment to see the second defendant on 10 March 1983. The letter also mentioned that the plaintiff would be in Singapore for a week. On the appointed day, the plaintiff came to see the second defendant on his tax matters. He gave the second defendant two contact telephone numbers. One was that of Standard Photo at MacPherson Road though the plaintiff did not tell the second defendant where the place of the second telephone number was. On 14 March 1983 the plaintiff returned to the second defendant's office and after being satisfied with the tax papers prepared by the second defendant, signed them. There is a discrepancy in the evidence as to whether the plaintiff did ask the second defendant questions on the accounts. But I do not think that this point is material for our present purposes. The plaintiff paid for the services of the second defendant. What happened thereafter is the matter in dispute.

I find, on the evidence, that after the two had finished with the tax matters and while waiting for the preparation of the receipt, they must have had a chat about what the plaintiff was doing in Australia. To my mind, that was only natural. The second defendant said that the plaintiff informed him that the plaintiff was looking for business opportunities in Australia especially in jewellery and stones. I am inclined to think that this was likely to be true since the plaintiff has told the Court that he is now in the gold and silver jewellery business, which is a somewhat similar kind of business. It must be in that kind of a context that the second defendant took out the emeralds from his drawer to show to the plaintiff. In this regard there is that evidence from the plaintiff that before he left the second defendant's office, he went to use the toilet. It is probably true that sometime that morning the plaintiff did go to the toilet. But this point does not seem to me to be material.

The plaintiff said that the emeralds were wrapped in the oily type of paper. On the other hand, the second defendant said that they were wrapped in a small plastic packet, like the remaining eight packets in Exhibit 'D2'. He explained that the emeralds were wrapped in that way to prevent accidental loss as the emeralds were very small articles. The plaintiff said that he took a few emeralds from the oily paper wrap to have a feel. However, the second defendant said that he handed a plastic packet containing emeralds, which was the packets marked as No. 4 in DB3, to the plaintiff for him to have a visual inspection. The plaintiff said that the second defendant's desk was cluttered with files whereas the second defendant said he had only five files on his table: three on one side and two on the other. Notwithstanding these contradictions in the evidence, one incontrovertible fact emerges and that is, that emeralds were in fact shown to the plaintiff.

The plaintiff said that he had replaced the emeralds which he picked up to feel and then the phone rang. As I have pointed out above, in cross-examination the plaintiff seemed to say that the phone rang first. The second defendant answered it and the plaintiff left. The plaintiff did not take the emeralds with him. On the other hand, the second defendant said that after he handed the plastic packets of emeralds to the plaintiff he told the plaintiff that he could either buy them straight away or he could decide before the end of the day. Then the phone rang and the second defendant picked it up. Without the second defendant noticing, the plaintiff left the second defendant's office without saying whether he was taking the emeralds straight away or he would decide before the end of the day. On this aspect of the evidence there are two common facts - one, the phone rang soon after the emeralds were shown to the plaintiff; two, the plaintiff left the office soon after the phone rang.

DB3, which sets out the detailed particulars of the ten packets, was not accepted by the plaintiff's Counsel. He suggested that DB3 could well be prepared after the event or shortly before the trial. But there is one point which runs counter to that suggestion and this point is there is both the police report and the letter dated 15 March 1983 (2DB13). In both these two documents there is a reference to 45 pieces of 8.98 carats of emeralds. It seems to me clear that such precise particulars could only be furnished based on some record. I find that that record must be DB3. I am satisfied that DB3 was prepared by the second defendant on 8 March 1983 when he separated the emeralds he bought in bulk on 6 March 1983 into ten lots based mainly on size. I am also inclined to accept the second defendant's evidence that each of the lots were wrapped in a small plastic packet to facilitate easy handling and prevent accidental dropping of any stones. There were not wrapped in the oily paper. Even the plaintiff agreed that the oily paper is stiff and if pressed 'the stones would jump'.

I must also add that I am much impressed by the fact that the second defendant made three calls to each of the two contact numbers that day to try to reach the plaintiff to get his confirmation on the emeralds. Several calls were also made by the second defendant on the morning of 15 March 1983. Though there is a discrepancy in his evidence regarding the number of calls the second defendant made that morning, I do not think that matters too much. Counsel for the plaintiff submitted that these calls merely go to show that the second defendant having lost or misplaced the emeralds sought to check with the plaintiff whether he had taken them. But on the plaintiff's own evidence, when he eventually contacted the second defendant on the morning of 15 March 1983, the first thing the second defendant said was:

> Hi Robin, you did not return the stones. Unless you return it right away, I am going to report you to the police.

These words do not seem to me to show that of a person who was not sure but a person who was convinced, rightly or wrongly, that the plaintiff had taken the emeralds. And of course the response of the plaintiff by calling the second defendant a mad man and threatening to sue did not help to allay the worst fears of the second defendant. Such utterance could only have a negative effect on the second defendant. A better and constructive response would have been for the plaintiff to explain what he did to the emeralds after feeling them, recall the events the day before and perhaps ask the second defendant to do a search. That would have been more helpful and removed whatever fears then present in the second defendant's mind.

There is one other point concerning the telephone conversation on 15 March 1983. I accept the evidence of the plaintiff that he told the second defendant that he would be coming over to the latter's office to confront him on the accusation. However, in view of the rather heated exchange that had taken place between them on the telephone, I doubt there was any firm understanding that the second defendant would wait for the plaintiff to come over for a confrontation before he would take any further steps in the matter.

On the evidence I am satisfied that the first defendant had been in the precious stones business for some time before 1983, that the second defendant did on behalf of the first defendant buy a quantity of emeralds from a seller on 6 March 1983 and that he repacked them into ten plastic packets according to size. I find that arising out of their chat of what the plaintiff was doing in Australia, and pursuant to at least an implied request, the second defendant showed the plaintiff the packet of emeralds saying he could buy them straight away or he could decide at the end of the day or words to that effect. It is possible that the plaintiff might not have heard completely what the second defendant had said. At that very moment the phone rang. Before leaving, the plaintiff probably did bid the second defendant farewell and could have placed the plastic packet, which was really quite small, somewhere on the table. There were files on the table; I do not think it is necessary for me to determine how many. But because the second defendant was concentrating on what he was talking on the telephone, he probably he did not hear the plaintiff and did not observe what the plaintiff did with the packets of emeralds. I think the plaintiff could have been mistaken about how the emeralds were wrapped because there were two empty oily wrappers in Exhibit 'D2'. I should like to add that in reaching the foregoing findings, I placed no reliance on the alleged sale of a bracelet by the second defendant to the plaintiff in 1975. That is really quite insignificant. If the plaintiff had forgotten about that transaction, I can't really fault him. The transaction was just too long ago to expect him to remember.

Counsel for the plaintiff also relied on DB2 to say that the second defendant did not in fact lose any stones. He argued that as DB2 stated that one Steve Papps sold 175 emeralds to the second defendant and as the second defendant now still has more than 175 emeralds in the remaining eight packets in Exhibit 'D2' that means that the second defendant has lost nothing. In fact he has more. However, having considered DB3 and the second defendant's evidence on this including the element of weight, it is clear that the figure 175 is a mistake. It should have been 275. Incidentally there was another error in DB2 but that was corrected. Counsel for the plaintiff also showed that in packets No. 9 and No. 10, the number of emeralds contained in each of them was one short of what was stated on each packet (49 instead of 50 and 25 instead of 26). It seems to me that those were probably due to counting errors. In cross-examination, the plaintiffs Counsel also attempted to show that the way in which the second defendant kept his record of the precious stones was not very satisfactory. I have carefully considered these points but I not think they materially affect the case.

I turn next to examine the police report lodged by the second defendant. The complaints of the plaintiff on the report are broadly these: (i) it was not true that the plaintiff 'requested' to see the emeralds; (ii) the second defendant had failed to state in the report that the plaintiff had contacted him that morning and denied taking the emeralds; (iii) it was not true that the plaintiff could not be contacted at the two telephone numbers; (iv) the plaintiff was not flying off on 17 March 1983; (v) the plaintiff was not a temporary resident of Australia but was an immigrant. On (i), as I have stated above, there was in the context of the circumstances at least an implied request to see the emeralds. On (ii), I agree that the second defendant should have stated that the plaintiff did finally contact him that morning and he denied taking the stones. But as the second defendant would be questioned (as advised by his solicitor) on the report by the police officer, I do not think this omission materially affected the thrust of the report or indicated any improper motive. After all, he also knew that the plaintiff would be given a chance to explain by the police officer. His main concern was obviously to recover the emeralds. As regards (iii), in a sense it is true that his attempts to reach the plaintiff at the two numbers were not successful. This point is really connected to point (ii). As regards (iv), the date of the plaintiff's departure, I would not say that it was erroneous, bearing in mind that the second defendant was told by the plaintiff that he would be in Singapore for a week. As regards (v), I do not think it was wrong to describe the plaintiff as a temporary resident of Australia. The second defendant said that the plaintiff had once told him that the plaintiff might come back to Singapore. As I understand it, the plaintiff was given permanent resident status, subject to conditions.

Therefore, looking at the police report as a whole and bearing in mind that the second defendant was aware that he himself would be questioned on the report and the plaintiff would also be given a chance to explain, I do not think the wording of the report or any omission therein could reasonably be construed to suggest any improper intention or motive.

Finally, I turn to the letter of the same date written by the second defendant's solicitor. It was obviously written on the premise that the police had still not located the plaintiff, otherwise there would have been no need to ask the airport authorities to check the manifest of passengers on flights from Singapore to Australia for that day and the next two days and to arrest the plaintiff. What this letter shows was an aggrieved complainant who wanted the police to act with due despatch. He wanted the wrongdoer to be brought to justice and did not want to see the plaintiff (whom he *bona fide* believed took the emeralds) slip out of Singapore. It was suggested by the plaintiff that this letter shows bad motive as it sought to apply pressure on the police. Furthermore, the fact that it was copied to four other parties also indicates malice. I do not think that necessarily follows. A party who is convinced that someone else has taken his things is entitled to pursue his case vigorously.

As regards the four carbon copy addresses, the relevance of the first three seems obvious to me. The copy to the Australian High Commission was of course to inform the Australian government that the plaintiff had committed an offence so that if the plaintiff should escape from Singapore to Australia, steps could be taken to bring him back to justice. Therefore, the four addressee were not uninterested persons. Further, to copy the letter to the four addressee was the idea of his solicitor to which the second defendant agreed. In any event and equally important, the four copies were never despatched to the four addressee. They were all given, together with the original, to Insp. Loo, leaving it to him to decide whether there was a need to despatch them to any of the four addressee. This is not the attitude of a person who wished to cause harm to the plaintiff indiscriminately. Since at the time the letter and the copies arrived at Insp. Loo's office, the plaintiff was already before Insp. Loo,

I think it would be fair to assume that (though there is no direct evidence here) Insp. Loo would not have despatched them to the four addressees as there would have been no point in sending out those copies. The police investigation papers on the case had been destroyed. In this connection I note that when the plaintiff eventually left Singapore on 20 March 1983 he was not searched.

Having carefully reviewed and examined the evidence as a whole, on balance I would be inclined to think that there was some reasonable and probable cause for the second defendant to have lodged the police report. In *Abrath v. North Eastern Railway Co.*, Cave J left this question to the jury:

> Did (the defendants) honestly believe the case which they laid before the magistrates?

On the facts of our present case, I think the answer to the question is in the affirmative. The report lodged by the second defendant did not rest on mere suspicion. It was based on direct personal interaction between the second defendant and the plaintiff. Though a few discrepancies or unsatisfactory answers in the evidence of the second defendant were pointed out by the plaintiff's Counsel (e.g. number of calls he made on 15 March 1983; said he did not want the police to arrest the plaintiff and yet something different was stated in the last paragraph of the letter dated 15 March 1983; said he was not prepared to call the plaintiff a thief until the police investigated, yet see letter of 15 March 1983), I do not think these points affected the overall picture. There are, in my view, not really that significant. He had, in any case, explained that he was advised by his solicitor that to stop the plaintiff from leaving Singapore at the airport, the plaintiff had to be arrested. I am unable to find any motive for the second defendant wanting to accuse the plaintiff of the offence other than the fact that he was genuinely thought that the plaintiff had taken the emeralds. He even consulted his solicitor before making the report. I am conscious that mere consultation with a solicitor does not convert a report, which is not otherwise based on reasonable and probable cause, into a report which is so based. But this is certainly a factor in overall assessment.

In reaching my conclusion that the second defendant acted on reasonable and probable cause, I have borne in mind the following views expressed by Hawkin J in *Hicks v. Faulkner* [1878] 8 QBD 167 at p. 171, which were subsequently approved by the House of Lords in *Herniman v. Smith* [1938] AC 305:

> I should define reasonable and probable cause to be, an honest belief in guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

However, should I be wrong to hold that there was reasonable and probable cause, I am satisfied that in the circumstances the report was not lodged with any malice, i.e. presence of spite, ill-will or some improper and indirect motives. I am satisfied that the second defendant honestly thought that the plaintiff took the emeralds. As I have pointed out, the response of the plaintiff over the telephone on the morning of 15 March 1983 did not help matters but aggravated the situation. There could have been a *bona fide* mistake on the second defendant's part as regards the question whether the plaintiff did place the packet of emeralds on the table before he left; but that in no way suggested malice. More importantly, the second defendant did not act just on his own. As I have said, he took the precaution of consulting his solicitor before making the report. He was appraised of the consequences that would follow. That is nothing to suggest that in making the report the intention of the second defendant was not to recover the emeralds but to cause wrongful harm to the plaintiff.

The plaintiff's Counsel has also submitted that the refusal of the second defendant to jointly petition the public prosecutor to have the charge withdrawn and to allow the dispute to be resolved in a civil action indicated malice. Now if the second defendant honestly thought, based on facts within his knowledge that an offence had been committed I do not see why he should be obliged to make such a joint petition and if he did not do so that would be evidence of malice. He took this stand after obtaining advice from his solicitor. There is nothing to stop an accused person from submitting his own petition, which was what the plaintiff did. We do not know why the public prosecutor withdrew the charge. I assumed one or more of the reasons given in the petition must have found favour with the public prosecutor or it could be a case where the public prosecutor had decided to give the benefit of the doubt to the plaintiff.

This is in my view a truly unfortunate case. A cordial relationship which spanned over a period of more than 30 years was brought to an abrupt unpleasant end through a regrettable incident. Both are respectable individuals. I have given this matter the most anxious consideration but I cannot find a motive for the second defendant in wanting to cause wrongful harm to the plaintiff. The second defendant is a professional person. This is not a case where, out of the blue, an allegation like that was made.

Counsel for the plaintiff suggested this motive. The second defendant had lost the emeralds and would have to account to the shareholders of the first defendant; thus he put the blame on the plaintiff. If that was in fact the motive then it was absolutely low down. But considering the circumstances, I do not think this is likely to be the case. Unless a person has lost his mind, I do not see him putting a blame of this kind on someone with whom the person has 30 years of cordial relationship. There is no suggestion that the second defendant has lost his mind. The first defendant was after all a family company of which the second defendant was the main shareholder. The amount involved was not even large. If this suggested motive was in fact the real reason for making the police report then having done so I would have thought that he would more likely have agreed to submitting the joint petition to the public prosecutor, having already achieved his purpose. To my mind it is clear that a combination of a number of circumstances brought about this unfortunate turn of events and caused a cordial relationship to turn sour.

In the event, I dismiss the claim based on malicious prosecution. As regards the claim based on defamation, there can be no doubt that to accuse a person of having committed the crime of cheating or criminal breach of trust is defamatory. For the present purpose I need only consider the defence of qualified privilege. Counsel for the plaintiff conceded, and quite rightly so that the police report and the letter of 15 March 1983 were written on an occasion of qualified privilege: *Collins v. Cooper* [1902] 19 TLR 118. To succeed in the action, the plaintiff must show that the second defendant was actuated by express malice, that is to say by spite or ill-will or some other wrong or improper motive: *Bowles v. Armstrong* [1913] 32 NZLR 409. For the same reasons indicated above, I am satisfied that no malice was shown and therefore, the defence of qualified privilege succeeds. There remains the question of the counterclaim by the second defendant for the return of the emeralds. Having heard both the plaintiff and the second defendant, I am inclined, on balance, to hold that the second defendant has not proven that the plaintiff had taken away the packet of emeralds which was handed to him for his visual inspection. The second defendant did not see the plaintiff leave his office with the emeralds. The plaintiff said that he had left the emeralds on the table. It is not for me to speculate what could have happened to the packet that was probably left on the table. The burden of proof is on the second defendant to show that the plaintiff had taken the emeralds away and he has not discharged that burden. I accordingly dismiss the counterclaim.

There is one other matter which I ought to allude to before I conclude this judgment. This relates to a telephone call which the son (DW2) of the second defendant made to the plaintiff in Australia in 1987 with the aim of exploring a compromise and bringing this action to an end. The son said that he made the call because the second defendant was then about to undergo a major operation, following the results of some tests. The second defendant knew that the son would be making the call. I do not think anything should reasonably be drawn against the second defendant on that account.

Finally, as regards costs, considering all the circumstances, I think the ends of justice would be met in this case if I should order that each party bear his own costs and I do so order.

Also found at [1991] 3 CLJ 3028